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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GETTY OIL COMPANY,
Petitioner

v.

DEPARTMENT OF ENERGY, *et al.*,

AND

UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. May an agency order imposing liability be sustained where the agency's proceeding was conducted: without disclosure by the agency of the *ex parte* submissions upon which it relied, without allowing discovery sought on material facts in dispute, with the burden of proof placed on the accused party, without any administrative law judge or independent finder of facts, without the requested adversarial hearing, without any rules of evidence or discovery, and without notifying the accused party that the period of the alleged price violation would be extended by 15 months?

2. May evidence qualify as substantial for the purpose of substantial evidence review where there was never any opportunity for adversarial testing of that evidence, either before the agency or in the District Court?

3. May prejudgment interest be awarded where the only regulation providing for prejudgment interest was adopted without compliance with applicable rulemaking requirements, and where the amount of the underlying claim was both uncertain and incalculable prior to judgment?

4. May the Department of Energy impose liability contrary to the plain meaning of an undefined term for the period before a prospective regulation mandating a different definition had been adopted?

PARTIES TO THE PROCEEDING

The Respondents are the Department of Energy; Donald P. Hodel, Secretary of Energy; George Brezney, Director, Office of Hearings and Appeals, Department of Energy; and the United States of America.

Petitioner Getty Oil Company's parent is Texaco Acquisitions Inc., which is in turn wholly-owned by Texaco Inc. Getty Oil Company has the following non-wholly-owned subsidiaries and affiliates: Manito Pipelines Ltd., Chemplex Company (Joint Venture), Chemplex Construction Corporation, Iricon Agency Ltd., Butte Pipe Line Company, Gibson Holdings, Ltd., Northern Tier Pipeline Company, Texoma Pipe Line Company, Wascona Pipe Line, Inc., Wascona Pipe Line, Ltd., Chase Transportation Company (Joint Venture), Chisholm Pipeline Company, MAGEC Finance Company (Partnership), Osage Pipe Line Company, Seminole Pipeline Company, Halbouty Alaska Oil Company, Chase Terminal Company (Joint Venture), Tide Water Oil Company (India), Ltd., Yong-Nam Chemical Company, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner Getty Oil Company respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Temporary Emergency Court of Appeals of the United States entered in this action on October 5, 1984.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States, No. 3-37, is not yet reported but is reproduced at Appendix A. The decision of

the United States District Court for the District of Delaware, Civil Action No. 77-434, 569 F.Supp. 1204 (D.Del. 1983), is reproduced at Appendix B. The Decision and Order issued October 7, 1977, by the Department of Energy is reproduced at Appendix F.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was handed down on September 26, 1984, and judgment was entered on October 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976) and § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 *note*, as incorporated in § 5 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Sections 207(a) and 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 *note* (1976), appear at Appendix J. Section 754(a)(1) of the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. § 754(a)(1) (1976) appears at Appendix K. Section 552(a)(1)(C) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(c) (1976), appears at Appendix L. Relevant portions of Part 205, entitled "Administrative Procedures and Sanctions," of the Federal Energy Administration regulations in effect at the time of the crude oil transactions, 10 C.F.R. §§ 205.106, 205.108, and 205.172 (1977), appear at Appendix M. Section 205.196(a), entitled "Remedies," of the regulations of the Federal Energy Ad-

ministration as amended in 1975 and in effect at the time of the crude oil transactions, 10 C.F.R. § 205.195(a) (1977), appears at Appendix N. Relevant portions of Part 212, entitled "Mandatory Petroleum Price Regulations," of the Federal Energy Office in effect at the time of the crude oil transactions, 10 C.F.R. §§ 212.31, 212.73 (1977), appear at Appendix O. An interim amendment regarding exchanges adopted in 1978, 43 Fed. Reg. 59,810 (Dec. 21, 1978), appears at Appendix P.

STATEMENT OF THE CASE

This is an appeal by Getty Oil Company ("Getty") from an Opinion of the Temporary Emergency Court of Appeals ("TECA") modifying and affirming the decision of the United States District Court for the District of Delaware. The District Court sustained DOE's finding that Getty had violated Department of Energy ("DOE") producer price regulations by overcharging The Standard Oil Company (Ohio) ("Sohio") on sales of domestic crude oil and that the DOE had properly assessed prejudgment interest on such overcharges.

FACTUAL BACKGROUND

In May 1973, prior to the imposition of price controls, Getty and Sohio entered into three agreements:

(1) Sohio sold Getty its interest in Getty's oil-producing properties in a California oilfield.

(2) Getty agreed to sell Sohio specified volumes of various grades of domestic crude oil for cash, at prices which the contract provided could not exceed the posted prices.

(3) Sohio agreed to sell Getty equivalent volumes of two foreign crudes for cash at prices which re-

flected the then-prevailing differentials between those crudes and the domestic crude which Getty sold to Sohio pursuant to the domestic agreement. This agreement provided a price escalation mechanism which could allow the adjustment of prices to market values. This crude was resold by Getty in Japan and never entered the United States.

Each sale of crude oil was separately billed and separately paid for in full in cash, without any set-off or adjustment. Payment under the domestic agreement was due within ten days of receipt of invoice; payment under the foreign agreement was due in ninety days.

The sales of the domestic crude were *not conditioned* upon sales of the foreign crude. The termination provisions were not symmetrical between the two crude oil sales agreements. The two sales contracts involved different types of oil, different gravities, different sulphur contents, different prices, different countries of origin, and different delivery points.

Both Sohio and Getty began treating the transactions as separate purchases and sales, and reported them as such to the DOE. As the DOE's Office of Hearings and Appeals ("OHA") itself later found, the parties intended to sell the respective crudes at prevailing market prices: "Thus, when the bargain was struck by Getty and Sohio, each firm contemplated receiving the other's crude oil at the generally prevailing market price for the grade of crude oil involved at the location where it was to be transferred." (Appendix F at 98a.)

Subsequent to the execution of the contracts, the Arab oil embargo occurred and price controls on domestic crude oil were imposed. Between August 19, 1973 and January 28, 1981, the maximum price which a producer could charge for domestic crude oil was determined by

the Mandatory Petroleum Price Regulations, set forth at 10 C.F.R. Part 212 (1977). During the time period pertinent to this case, the regulations provided, *inter alia*, that "no producer may charge a price higher than the lower tier ceiling price for any first sale of domestic crude oil." 10 C.F.R. § 212.73(a) (1977) (Appendix O). The regulations defined "price" as "any consideration for the sale of any property or services and includes commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form." 10 C.F.R. § 212.31 (1977) (Appendix O). The regulations did not define "consideration."

As a result of the Arab oil embargo, the value of the foreign crude purchased by Getty increased dramatically while domestic crude prices were frozen. Sohio was, consequently, suddenly selling its foreign crude to Getty at contract prices which were below prevailing market prices. Sohio was apparently content with that arrangement because it was passing through to its domestic customers not the price it was paying Getty for the domestic oil it was purchasing, but the higher "value" of the foreign crude it was selling to Getty.

THE PROCEEDINGS BELOW

The Administrative Proceedings

On August 15, 1974, one year after price controls began, Sohio, unbeknown to Getty, sought DOE permission to amend its reports so that the transactions with Getty could be retroactively reported as exchanges. After informing Sohio that the transactions were separate sales, the DOE conducted an audit of the transactions and issued a Notice of Probable Violation ("NOPV") to Sohio on October 11, 1974, charging that Sohio improperly treated the transactions as exchanges and that the cost of the domestic crude purchased by Sohio was the price which it paid Getty, not the value of the foreign crude which it sold to Getty at a lower price. After a secret

meeting with Sohio officials at which no records were kept, the DOE suddenly withdrew its NOPV on November 4, 1974.

Thereafter, the Getty/Sohio transactions were examined by the DOE's Offices of General Counsel, Compliance, Crude Oil Operations, Regulations Management, and the Office of the Assistant Federal Energy Administration ("FEA") Administrator. (Appendix G) Personnel in each office recognized that Getty's treatment of the transactions was lawful. For example, on February 14, 1975, Rendel Alldredge of DOE's Office of Crude Oil Operations wrote a memorandum stating:

> [I]t cannot be justifiably asserted either that the Sohio/Getty Arrangement violates any laws or regulations . . . or that it was entered into with any such intent . . . .

Alldredge recommended that the agency "move quickly to produce adequate definitions and delineations of and between sales and exchanges . . . ." (Appendix G at 156a)

In October 1975, Chuck Boehl of DOE's Office of Regulations Management reported to Assistant Administrator Gorman Smith that:

> General Counsel now apparently feels that FEA regulations permit the Getty-Sohio type of exchange and Sohio's method of booking costs. GC proposes to issue a proposed amendment to the regulations to be applied prospectively . . . .
>
> Although the two agreements seem related they are separate and payment is made for the crude in each case (which would seem to indicate a sale) . . . I am not convinced the Getty-Sohio deal for domestic crude is an exchange. (Appendix G at 157a)

On July 29, 1975, Assistant Administrator Gorman Smith ordered prospective rulemaking (Appendix G at 158a), which was not adopted until 1978 when the agency provided, for the first time, that matching purchases and

sales should be treated not as sales, but as exchanges. *See* Appendix P at 184a.

Nevertheless, on August 1, 1975, only three days after ordering such prospective rulemaking, the DOE issued an NOPV to Getty. On August 12, 1976, the DOE issued a Remedial Order to Getty charging Getty with a price violation for the period of October 1973 through October 1974 and an entitlements violation for the period of November 1974 through January 1976.[1]

Getty appealed the Remedial Order to the Office of Hearing and Appeals. The administrative proceeding before OHA was not conducted under the agency's rules of procedure that are now in place. At that time, there were no rules against *ex parte* contacts, no rules of discovery, no rules of evidence, no definitive rules of procedure, and no identifiable record. The burden of proof was on Getty. There were no witnesses, much less any opportunity to cross-examine them. Large portions of the record were secret from Getty, including evidence underlying the Remedial Order, evidence to support the calculation of the alleged overcharges, and evidence gathered *ex parte* in the course of OHA's investigation of Getty's appeal.

Getty sought discovery on several disputed issues of material fact, including objective evidence of Sohio's contractual intent, the calculation of alleged overcharges, and contemporaneous construction of applicable regulations. Getty's discovery was denied except as to the transfer price data base which the agency never provided—giving Getty computer summaries instead. Getty sought an evidentiary hearing on seven occasions which OHA denied. The chronology of Getty's unsuccessful attempts to obtain discovery and an evidentiary hearing is summarized in Appendix I.

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[1] The price violation assumed a sale, while the entitlements violation assumed that Getty had retained the crude.

On October 7, 1977, OHA issued a Final Decision and Order which found that the parties initially intended to receive the contract price for their respective crude oils, but that subsequent events changed the nature of the consideration. (Appendix F at 98a-99a) As a result, the Decision and Order concluded that the Getty and Sohio transactions thereupon became exchanges rather than sales. Based solely upon that finding, it concluded that there was a price violation by Getty because the foreign crude purchased by Getty thereby became part of the consideration for the domestic crude it had sold. Without notice to Getty or any opportunity to respond, the Decision and Order enlarged the period of alleged price violation by fifteen months. (Appendix F at 126a-127a) As a result, Getty's liability for the alleged price violation suddenly increased from $35,000,000 to over $84,000,000, exclusive of interest.

The Judicial Proceedings

Getty brought suit in the United States District Court for the District of Delaware seeking judicial review of the DOE's Decision and Order pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706 (1976), and seeking injunctive and declaratory relief pursuant to 28 U.S.C. §§ 1331-1332, 1337, 1361, 2201, and 2202 (1976). The Government counterclaimed for the amount of the overcharges found in the Decision and Order and for additional overcharges which had not been subject to any prior proceedings before the agency. On cross-motions for summary judgment,[2] the District Court, in its July 7, 1983, decision, affirmed Getty's liability for all

[2] Contrary to the decision of TECA, by moving for summary judgment seeking reversal of the DOE's erroneous rulings, Getty in no way admitted that there are no factual disputes in this case. Rather, Getty's motion was based on the numerous Constitutional and procedural defects in the DOE proceedings below, and other clear errors of law, and thus no underlying factual disputes were properly before the court.

but the first three-month period of the alleged violation, but concluded that the DOE had erred in calculating the amount of the overcharges by Getty and ordered a remand for a recalculation of damages.[3] (Appendix B at 43a) Following Getty's stipulation as to the calculation of damages which DOE would have made had this element of the remand gone forward, the District Court, by Final Order dated September 20, 1983, entered judgment for the DOE in the amount of $133,220,294.00, including prejudgment interest. (Appendix F)

TECA affirmed by decision dated September 26, 1984, modifying the District Court's judgment only as to the remedy, which TECA recognized was not an issue before it, having previously denied the participation of *amici curiae* on that very issue. (Appendix A)

REASONS FOR GRANTING THE WRIT

This Court has never granted a writ of certiorari for any case arising from TECA involving the issues of petroleum price controls or DOE procedures.[4] In the absence of any such review by this Court, TECA has evolved doctrines which substantially change the body of Constitutional law and administrative law, and which conflict with the decisions in virtually every circuit. Many of those changes are embodied in this case. They transcend energy regulation and will impact broad areas of commercial law.

In an adjudicative proceeding such as the one before the DOE, an agency may not rely upon *ex parte* submis-

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[3] Other elements of the Government's counterclaim were also remanded and remain on remand before the agency.

[4] This Court has granted certiorari in only two TECA cases. *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), involved New York State taxes. *Fry v. United States*, 421 U.S. 542 (1975), involved salaries of state employees. By contrast, this Court frequently has granted certiorari in natural gas cases, which do not emanate from TECA.

sions and secret evidence, but TECA permitted DOE to do so here, in conflict with previous holdings of this Court, and of the Ninth and District of Columbia Circuits. Agencies may not place the burden of proof on the accused party, but TECA permitted DOE to do so, in conflict with this Court's prior decisions. Although there were numerous disputed issues of material fact, TECA upheld an agency adjudication that afforded no opportunity for the confrontation and cross-examination of adverse witnesses or for any testing of the evidence before an administrative law judge or other independent finder of fact, in conflict with the District of Columbia Circuit. Agencies may not enlarge the time period of alleged violations without notice or opportunity to respond, but TECA permitted DOE to do so here, in conflict with the Seventh and the District of Columbia Circuits. Agencies are required to follow their own rules, but TECA has permitted DOE to abandon those rules as well, in conflict with its own prior decisions.

Contrary to established rules, TECA has here, in effect, allowed evidence to be considered substantial for purposes of substantial evidence review even though there was no opportunity for adversarial testing of it either before the agency or in the District Court, in conflict with the District of Columbia Circuit.

Despite uniform holdings that prejudgment interest cannot be awarded where the regulation providing for it was not adopted in compliance with applicable rulemaking procedures, or where the amount of damages claimed was uncertain, TECA has upheld such interest here, in conflict with the Third Circuit, the Fifth Circuit, and TECA's own prior opinions.

TECA has permitted an agency which knew it needed a prospective rule, and adopted one, to apply the substance of that rule retroactively, in conflict with TECA's own prior decisions. The DOE's imposition of liability was based on a radical departure from then-existing reg-

ulations are from common law distinctions of sales versus exchanges. In so doing the historic definition of consideration and the principles of contract divisibility have been abandoned.

In the absence of review by this Court, TECA's departure from general precedent has been noted by commentators. (*See* Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L.J. 113, 151.) This criticism of TECA has been echoed in a report on *Appellate Review for Emergency Programs* dated October 1984 by the American Bar Association Section of Administrative Law. (American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* (1984))

If allowed to stand unreviewed, this decision of TECA and others like it will have transformed the Constitutional and administrative law of this country, and TECA will have warped and twisted historic doctrines in ways that will impact broad areas of commercial life.

I. THE DOE VIOLATED THE MOST FUNDAMENTAL REQUIREMENTS OF PROCEDURAL DUE PROCESS

In *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), this Court declared that "[i]t is procedure that marks much of the difference between rule by law and rule by fiat."

Where, as here, an agency attempts to adjudicate private rights and liberties, the necessary procedures must include traditional judicial procedures. In *Hannah v. Larche*, 363 U.S. 420, 442 (1960), this Court said:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those

> agencies use the procedures which have traditionally been associated with the judicial process.

This does not mean that the DOE must convene a full trial to adjudicate. But it does mean that the agency must observe certain basic and fundamental procedures. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court specified the following procedures required by due process for agency adjudicative proceedings: (1) timely and adequate notice, (2) confrontation of adverse witnesses, (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination on the record of the hearing, (9) a statement of the reasons for the decision and an indication of the evidence relied on, and (10) an impartial decisionmaker.

Virtually every one of these fundamental procedural safeguards was missing in the proceeding before the agency below:

First, the agency relied upon secret evidence which it received *ex parte* and never disclosed to Getty during the course of the agency proceedings. Appendix I lists some of that evidence. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), this Court condemned receipt of evidence on an *ex parte* basis:

> Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable.

Second, Getty sought but was denied discovery on material facts in dispute. It is not proper for the Government to withhold the evidence on which it proceeded while purporting to afford the party an opportunity to appeal. Such a proceeding would be no more than "a

'game of blindman's buff.'" *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 585 (Ct. Cl. 1969), *quoting Simmons v. United States*, 348 U.S. 397, 405 (1955). It is because DOE has now admitted that consideration is based on intent[5] that the denial by the agency of the discovery Getty sought as to Sohio's objective intent was so prejudicial.

Third, Getty sought but was denied cross-examination on material facts in dispute, which violates the doctrine set forth in *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200-01 (D.C. Cir. 1976). Not only was there no cross-examination, but there were no witnesses at all, and there was no evidentiary hearing.

Fourth, there were only minimal rules of procedure, and no rules of evidence, and no rules of discovery. The Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(C) (1976) (Appendix L), requires administrative agencies to publish adequate rules of procedure for their proceedings.[6] Those rules should include reasonably detailed procedures, and include those for notice of charges, opportunity to present evidence and to cross-examine adverse witnesses. *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) (agency action "cannot be left to administrative improvisation on a case-by-case basis."). In *Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *aff'd mem.*, 539 F.2d 243 (D.C. Cir. 1976), the court confirmed that a "reasonably complete code of procedures set out in advance by which actions can be guided, and strategies planned," is required.

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[5] *See infra* at 20.

[6] DOE is subject to this requirement of the APA. Section 207(a) of the Economic Stabilization Act subjected the Cost of Living Council, predecessor to DOE, to Section 552 of the APA. 12 U.S.C. § 1904 *note* (1976) (Appendix J). Section 5 of the Emergency Petroleum Allocation Act incorporated Section 207 and made it applicable to any regulation or order issued under the Act's authority. 15 U.S.C. § 754(a)(1) (1976) (Appendix K).

Here, the agency did not have a "reasonably complete code" of rules. The procedures set out in Subpart H of DOE's regulations, 10 C.F.R. Part 205 (1977), merely described the mechanical steps to be followed in filling an appeal, and OHA's discretionary powers in evaluating the appeal.[7] Relevant sections of Part 205 appear at Appendix M.

Fifth, there was no administrative law judge or independent fact finder, which undermines any semblance of a fair adjudication.[8]

Sixth, the burden of proof was on Getty. Under 10 C.F.R. § 205.106(b)(2) (1977) of DOE's regulations, mere allegations in a remedial order were assumed to be true. (Appendix M) The agency was not required to produce evidence to support or defend its allegations but the burden was upon the company to prove that the agency's action was erroneous in fact or in law. In *Norwood v. Harrison*, 413 U.S. 455, 471 (1973), this Court made plain that:

> No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law.

In *Pan American World Airways, Inc. v. Boyd*, 207 F.Supp. 152, 154 (D.D.C. 1962), where as here the agency reached its tentative conclusions on the basis of a study, and then set hearings to receive comments on why the conclusions should not be carried into effect, the court declared that:

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[7] Thus, 10 C.F.R. § 205.106 (1977), permitted OHA to initiate an investigation of any statement in an appeal, solicit and accept comments from third parties subject to providing the appellant with an opportunity to respond, and in its discretion convene a conference or (non-evidentiary) hearing for the exchange of views on the appeal. (*See also* 10 C.F.R. §§ 205.108, 205.172 (1977)). (Appendix M)

[8] *See Gulf Oil Corp. v. DOE*, 663 F.2d 296 (D.C. Cir. 1981), where OHA engaged in *ex parte* communications.

> One cannot conceive a judicial tribunal first tentatively deciding a case *in camera ex parte*, and then trying it, putting the burden of proof on the parties who disagree with the tentative decision. Such a course seems contrary to the basic traditions of the common law and the fundamental concepts of our jurisprudence.

Finally, the time period of alleged price violation was enlarged by 15 months after Getty's opportunity to respond had expired. That action alone increased the amount of alleged price violation by more than $50 million exclusive of interest. That is precisely the practice that was addressed by the court in *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968), where the Court stated:

> [I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. . . .
>
> By substituting an issue . . . for the one framed by the pleadings, . . . the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

Id. at 1256-57 (emphasis in original) (citations omitted).

TECA dismisses all of this with the assertion that no facts were in dispute and Getty had stipulated to damages. Because this was a summary judgment case, only facts not in dispute were properly before the court. Many facts, such as Sohio's intent, were disputed by Getty but dismissed as irrelevant by the District Court. Because that intent is now admitted to be relevant, it was prejudicial in the extreme to deny Getty's discovery on that issue. That issue and the others disputed by Getty go

not to the question of damages but to the question of liability.[9]

The effect of TECA's decision is to sustain an order arising from a proceeding without any of the procedural safeguards which are the hallmarks of Anglo-American law.[10]

Even if any one of these failures standing alone were not fatal (and many are), taken together they represent a complete failure by this agency to provide a fair adjudication and violate procedural due process.

If those procedural defects were present in an immigration case or a civil service case, the courts would be quick to act. They should be no less ready to intervene when it is an oil company which finds itself before an agency.

II. EVIDENCE WHICH COULD NOT BE TESTED CANNOT AS A MATTER OF LAW CONSTITUTE SUBSTANTIAL EVIDENCE

It is self-evident that where critical facts are disputed, the evidence must be explored and tested at some stage

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[9] Getty's stipulation made during an oral conference with the court merely stipulated what DOE's damages would be, based on its theory, had a remand been ordered on that limited issue. The stipulation was entered into for the purpose of obtaining an appealable final order.

[10] DOE's procedures were not entirely unlike those of the infamous Court of Star Chamber. *See* M. Knappen, *Constitutional and Legal History of England* 317 (1942):

> The Star Chamber did not use the common law system of justice, but tended to employ the methods of the Roman law, which were very much more favorable to the executive. There was no jury; the suspect was not allowed to cross-examine or, in some cases, even to see the witnesses against him.

Here, too, there was no independent fact finder. Some of the evidence was secret and Getty was unable to test or challenge the remainder.

of a proceeding. If substantial evidence review precludes that testing process in the reviewing court through *de novo* discovery and cross-examination, *a fortiori* the evidence must have been disclosed and tested before the agency. In *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973), the court held that without such testing the record was inadequate for substantial evidence review:

> Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate.

Id. at 1260 (emphasis in original). The court then observed that:

> There must, however, be some mechanism whereby adverse parties can test, criticize and illumine the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination . . . . But whatever procedure is followed, it must assure that the Commission has a substantial evidentiary basis for its findings and it must provide the court with an adequate record on review.

Id. at 1262-63. Similarly, in *Glendenning v. Ribicoff*, 213 F. Supp. 301, 303 (W.D. Mo. 1962), involving adjudication of a social security disability claim, the court declared:

> In an administrative hearing where the facts, as in the case at bar, are (1) adjudicative, (2) disputed and (3) critical, nothing less than submission through evidence, subject to cross-examination and rebuttal, will normally suffice.

Here, not only was the evidence untested but much of it was secret and unknown to Getty throughout the duration of the administrative proceeding.[11] If these proce-

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[11] *See* Appendix H.

dures are allowed to stand as the basis for a judgment—whether it be for $1.33 or $133 million—then hundreds of years of Anglo-American procedural law will have been swept away.

III. TECA ERRED IN ALLOWING AN AWARD OF PREJUDGMENT INTEREST WHERE NO VALID REGULATION PROVIDED FOR PREJUDGMENT INTEREST AND WHERE THE AMOUNT OF DAMAGES CLAIMED WAS BOTH UNCERTAIN AND INCALCULABLE PRIOR TO THE ENTRY OF JUDGMENT BY THE DISTRICT COURT

DOE ordered Getty to pay interest on the overcharges assessed in the Decision and Order. (Appendix F at 126a) Such interest was assessed from the date of the transactions. This was improper for two reasons:

First, DOE has no regulatory authority to order interest on overcharges because the regulation which purports to confer that authority was promulgated without notice and comment. DOE relied upon § 205.195(a) of its regulations. (Appendix F at 123a-124a) As initially promulgated, § 205.195(a) was limited to DOE's authority to order refunds and said nothing whatever about assessing interest on such overcharges. Subsequently, without notice or comment, DOE amended § 205.195(a) to "clarify" that interest was required to be paid on refunds. (Appendix N) Such a fundamental change in the DOE's rules required the agency to conduct appropriate rulemaking proceedings. In *Texaco Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969), the court set aside a regulation which merely changed the method of calculating prejudgment interest, because that regulation had been adopted without complying with rulemaking procedures. If a regulation which merely changes the rate of interest for prejudgment interest requires rulemaking, *a fortiori*, a regulation imposing prejudgment interest in the first place would also require rulemaking.

Second, in *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1410 (Temp. Emer. Ct. App. 1983), TECA held that "pre-judgment interest is not available where the amount of damages claimed to be due is uncertain." *See also Belcher v. Birmingham Trust National Bank*, 488 F.2d 474 (5th Cir. 1973). In this case, not only were the amount of damages claimed uncertain, but every element required to make that calculation was uncertain. The domestic prices, the volumes, and the transfer values which together are used to calculate the size of DOE's claim, were all uncertain, as demonstrated by the fact that the District Court found that DOE had used the wrong transfer values, volumes, and prices and initially remanded those questions for further proceedings. (Appendix B at 43a)

With respect to the last fifteen months of alleged violation, until the Decision and Order was issued the District Court recognized that Getty did not even know it was charged with a violation. (Appendix B at 32a) That being true, the amount claimed was hardly certain, and TECA's conclusions sustaining prejudgment interest, for which it provided no rationale at all, were in error.

IV. TECA ERRED IN ALLOWING THE DOE TO APPLY THE SUBSTANCE OF A PROSPECTIVE RULE RETROACTIVELY

This case represents an attempt by the DOE to engraft new regulatory mandates onto the regulations as they existed at the time of the Getty-Sohio transactions. As set forth in Appendix G hereto, DOE's officials acknowledged that Getty violated no applicable regulation. They recognized as well that prospective rulemaking was required if sales were to be treated as anything other than sales. The agency, in fact, embarked upon a rulemaking proceeding which, however, did not change the rules until 1978. That rulemaking for the first time defined an exchange as including matching purchases

and sales. *See* 43 Fed. Reg. 59,810 (Dec. 21, 1978); Appendix P.

The issue here is whether the value of foreign oil purchased by Getty was part of the consideration for domestic oil sold by Getty prior to February 1976 and before the 1978 rulemaking was accomplished.

In its Decision and Order of October 7, 1977, the DOE concluded that the parties initially intended to receive the contract price for their respective crude oils: "Thus, when the bargain was struck by Getty and Sohio, each firm contemplated receiving the other's crude oil at the generally prevailing market price for the grade of crude oil involved at the location where it was to be transferred." (Appendix F at 98a).

The DOE then made three fundamental errors of law:

First, it concluded, without citing any legal authority, that subsequent events changed the nature of the consideration. (Appendix F at 98a-99a) The DOE has now admitted, at page 25 in its Opposition Brief filed with the District Court, that consideration "is determined as of the execution date of the contract." Thus, the fundamental rationale of the Decision and Order—that the identity of consideration can be changed by subsequent events—was in error. As the Seventh Circuit held in *Peter Fox Brewing Co. v. Sohio Petroleum Co.*, 296 F.2d 274, 281 (7th Cir. 1961), "[t]he rights of the parties fixed by contract are not governed by comparing their subsequent relative gains or losses."

Second, DOE erred in disregarding the express price provision of the domestic contract in determining consideration. The domestic contract stated that the price could not exceed posted prices:

> The price to be paid for crude oil to Getty . . . shall be the posted prices specified [in the 1971 contract]

> or the price which Getty Oil may lawfully charge, which may in no event exceed posted prices.[12]

As the Third Circuit held in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980), "the sanctity of the written words of the contract is embedded in the law of contract interpretation. . . . [A] court will make no inference or give any construction to the terms of a written contract that may be in conflict with the clearly expressed language of the written agreement."

DOE has cited no authority from any court in the land that express price terms in contracts can be disregarded or erased. The reasons are self-evident. Suppose a grocer contracts to buy a load of oranges at the then-market price, and at the same time, and because of that, loans the grower $15,000 at the maximum legal interest rate. If a killer frost then made the value of the oranges soar before they were delivered, would the subsequent frost make the now higher value of the oranges part of the consideration for the loan so that the hapless grocer becomes a violator of the usury law? That hypothetical is no more absurd on its face than the charge which Getty finds itself defending against in this case.[13]

Third, having erred in disregarding the express price provision of the domestic contract, and having erred in concluding that subsequent events change the identity of

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[12] It is not disputed that sales at "posted" prices would not violate any price control regulations. It is also not disputed that Getty did not receive any cash payment in excess of the posted prices.

[13] In the case at hand, the agreement as to the domestic crude, standing alone, was perfectly lawful. But under DOE's theory, with the presence of the agreement as to the foreign crude, Getty, to escape liability in January 1974 under that otherwise lawful domestic contract, would not only have had to give its oil to Sohio free, but pay Sohio 43 cents a barrel to take it. By January 1976 Getty would have had to pay Sohio $1.19 to take it. This is because the so-called excess value itself exceeded the ceiling price.

consideration, the DOE erred in concluding that because of those subsequent events, these sales became exchanges, thereby making the foreign crude purchased by Getty additional consideration for the domestic crude sold by it. In doing so, DOE erred yet again by disregarding the plain meaning of its own regulations.

Although the regulations as they then existed defined "price as any consideration for the sale of any property . . . ," 10 C.F.R. § 212.31 (1977), they did not define "consideration." (Appendix O) In that situation, as TECA itself has held in *Tenneco Oil Co. v. FEA*, 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979), "[t]he first principle of regulatory construction is that regulatory terms must be interpreted according to their commonly understood definitions in the absence of a specific regulatory definition."

That distinction between sales and exchanges was well established within industry practice, at common law, and under DOE's own regulations. That distinction was pointed out by the Sixth Circuit, which held in *Trenton Cotton Oil Co. v. Commissioner*, 147 F.2d 33, 36 (6th Cir. 1945), that an exchange "exclud[es] transactions into which money enters either as the consideration or as a basis of measure." Here it was both.

The DOE has also now admitted at page 25 of its Opposition Brief filed with the District Court that consideration "depends upon the intent of the parties." Here, the intent was for matching purchases and sales and not for exchanges. In this case if the parties had intended exchanges,

—there would have been no price clauses;

—nothing would have limited the domestic sales to posted prices;

—there would have been no price adjustment provision in the foreign contract to relate prices to values;

—the parties would not have paid for all the purchases in full;

—the payments would not have been at different times, 10 days for domestic and 90 days for foreign;

—the contracts would not have permitted the domestic deliveries to outlast the foreign if the foreign oil was the *quid pro quo* for the domestic; and

—both parties would not have begun treating the transaction as separate sales.

Both the District Court and TECA erred by approaching the problem as though their analyses could end when they concluded that the transactions could be treated as one. But that could not even begin a correct analysis. At common law under the established principles of contract divisibility, even if these agreements had been written as one contract, the obligations would be separate, and the considerations would be separate and distinct.

The doctrines of contract divisibility[14] are as old and well-established as contract law itself. Five factors must be examined in determining whether contracts are divisible and whether the considerations are separate: (1) intent,[15] (2) separately stated consideration apportioned to

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[14] A "divisible contract" is one the performance of which is divided into different groups, each set embracing performances which are the agreed exchange for the others. 17A C.J.S. *Contracts* § 331 (1963).

[15] This is the most important factor:

> Primarily the question of whether a contract is entire or severable is one of intention, to be determined from the language which the parties use, and the subject matter and circumstances of the agreement.

17A C.J.S. *Contracts* § 332 at 309 (1963).

value,[16] (3) whether the performances are separate,[17] (4) separate subject matter,[18] and (5) separate assents.[19] Here, the intent, as shown above, was for matching purchases and sales, rather than for exchanges. The considerations were separately stated and apportioned as to value, because the domestic contract provided that the price of the domestic oil sold might "in no event exceed such posted prices," and the foreign contract contained a price adjustment clause which allowed the price to increase according to market value. The performances were separate because the domestic sales were not conditioned upon the continuation of the foreign purchases. The subject matters were separate because the transactions involved different types of oil, different countries of origin, different prices, different gravities, different sulphur contents, and different delivery points. Finally, there were unquestionably separate assents demonstrated from the fact that the agreements were written as separate contracts.

Thus, under the principles of contract divisibility, the contracts were divisible, the considerations were separate, and the foreign crude oil purchased by Getty was not additional consideration for the domestic crude oil sold by it. Consequently there was no price violation.

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[16] [W]here the portion of the contract to be performed by one party consists of several and distinct items, *and the price to be paid is apportioned to each item according to the value thereof* and not as one unit in a whole or a part of round sum, the contract will ordinarily be regarded as severable. . . .

17 C.J.S. *Contracts* § 334 at 312-13 (1963) (emphasis added).

[17] 17A C.J.S. *Contracts* § 331 (1963).

[18] 17A C.J.S. *Contracts* § 333 (1963). Different sales of different items constitute separate transactions. *See, e.g., Jones v. Pepsi-Cola Co.*, 223 F.Supp. 650 (D. Neb. 1963); *Purdin v. Westwood Ranch & Livestock Co.*, 67 Mont. 553, 216 P. 326 (1923).

[19] 17 C.J.S. *Contracts* § 331 (1963).

The remarkable thing about this case is that the DOE, the District Court, and TECA never found or relied upon any case law to support the conclusion that the foreign oil was added consideration for the domestic. Hundreds of years of contract law were washed away without any authority or any analysis of the principles of consideration or contract divisibility.

The point here is not that this Court should decide common law questions concerning consideration and contract divisibility. Instead, the issue is whether the principles of a prospective rule, which required matching purchases and sales to be treated not as sales but, differently, as exchanges, can be applied in an enforcement case to the period prior to that rule's adoption and effective date. *See generally SEC v. Chenery*, 332 U.S. 194, 202-03 (1947).

This is not the first time that TECA has allowed enforcement against Getty of a prospective rule which has not yet ben adopted. In *Getty Oil Co. v. DOE*, 581 F.2d 838 (Temp. Emer. Ct. App. 1978), when Getty was charged with overcharging for solvents, Judge Becker, writing for the majority, dismissed the failure of the price control regulations to include solvents as "immaterial." *Id.* at 842. By contrast, Judge Zirpoli, in his dissent, stated:

> If the price of solvents was subject to controls during the period of time relevant to this appeal, then those controls must be found in the agency's regulations, not in the agency's assertedly mandatory duty to issue such regulations. While the majority dismisses appellant's attack on the regulations, even the agency concedes that the pricing regulations, by their literal terms and without any need on Getty's part to resort to hypertechnical obfuscation, simply failed to cover solvents. It may well be that the agency *intended* to draft regulations covering solvents, but the plain fact is that it did not do so.

Id. at 843 (Zirpoli, J., dissenting) (emphasis in original).

The issue which needs to be decided by this Court is whether a business can be subjected to a judgment of more than $130 million when it is charged with violating an unstated regulation that the agency's own people in its Offices of General Counsel, Compliance, Crude Oil Operations, Regulations Management, and its Assistant Administrator, could not find.

If the rule announced by TECA itself in *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 n.20 (Temp. Emer. Ct. App. 1977), *cert. denied*, 434 U.S. 836 (1977), that "[f]undamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application," is to be abrogated, it will have a profound impact upon how our society will be governed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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